Supreme Court, U.S.
FILED
NOV 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-252

In the Supreme Court of the United States

OCTOBER TERM, 1985

CENTRAL & SOUTHERN MOTOR FREIGHT TARIFF ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Associate General Counsel

CRAIG M. KEATS
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

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QUESTION PRESENTED

Whether the Interstate Commerce Commission's decision to exempt motor contract carriers of property from the obligation to file tariffs containing the rates set in the carriers' contracts with individual shippers is a proper exercise of the Commission's statutory exemption authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 757 F.2d 301. The decision of the Interstate Commerce Commission affirmed by the court of appeals (Pet. App. 59a-88a) is reported at 133 M.C.C. 150. The decisions of the Interstate Commerce Commission that the court of appeals found moot (Pet. App. 89a-92a, 93a-94a, 95a-98a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1985. A petition for rehearing was denied on May 17, 1985 (Pet. App.99a). The petition for a writ of certiorari was filed on August 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the regulation by the Interstate Commerce Commission (ICC) of motor contract carriers of property. Motor contract carriers "provide[] motor vehicle transportation of property for compensation under continuing agreements with one or more persons" (49 U.S.C. 10102(14)(B)). A motor common carrier, by contrast, is "a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes" (49 U.S.C. 10102(13)). Thus, contract carriers operate under contracts with individual shippers while the services of common carriers are available to the public at large.

The Interstate Commerce Act requires a motor contract carrier to file with the Commission tariffs setting forth the carrier's actual and minimum rates (49 U.S.C. 10702(b), 10762). The statute prohibits such a carrier from providing transportation unless the rate for the transportation is contained in a tariff filed with the Commission (49 U.S.C. 10761(a)). These provisions require a contract carrier to file a tariff setting forth the rate established by each contract between the carrier and an individual shipper. However, Congress authorized the ICC to exempt contract carriers from these requirements "when relief is consistent with the public interest and the [national] transportation policy [set forth in 49 U.S.C. 10101]." 49 U.S.C. 10761(b); see also 49 U.S.C. 10702(b) and 10762(f).

2. In the early 1980's, a number of individual contract carriers sought and obtained exemptions from the tariff filing requirement (Pet. App. 9a, 89a-92a, 93a-94a, 95a-98a). Several parties, including the Federal Trade Commission, suggested in mid-1982 that the ICC grant such an exemption to all motor contract carriers (*id.* at 7a-8a, 59a-60a). After issuing a notice of proposed rulemaking and reviewing public comments, the Commission voted to exempt all motor contract carriers of prop-

erty from the tariff requirement (*id.* at 59a-88a). The ICC found that "[t]he public interest lies in ready access to competitive, efficient, and reasonably priced motor carrier service when and where needed" (*id.* at 69a), and concluded that "[f]reeing contract carriers from the requirements of the tariff filing system will promote competitive pricing by allowing them to tailor their service and price options to the individual and varying needs of their contract shippers. Further, eliminating the preparation and filing of tariffs will result in substantial cost savings" (*id.* at 69a-70a (footnote omitted)).

The Commission rejected the claim that an exemption would enable contract carriers to gain an unfair advantage over common carriers because contract carriers would be able to conceal their prices. Observing that the argument was "an unappealing request for equality of disadvantage," the Commission concluded that the best approach was to attempt to "relieve any unnecessary regulatory burdens for all transportation sectors" (Pet. App. 72a).[1] It found that common carriers could lose traffic to contract carriers only "in marginal areas" and that "[s]ervice on-demand to the occasional shipper will remain a huge part of the market" (*id.* at 72a n.16). The Commission accordingly held that the benefits from increased competition and the reduction in the regulatory burden outweighed any possible loss of business by common carriers (*id.* at 72a n.16, 73a).

The ICC also found that an exemption from the tariff filing requirement would not enable contract carriers to engage in predatory pricing. This behavior is defined as

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[1] The Commission noted that contract carrier tariffs do not disclose all of the terms and conditions of the contract and that "[c]onsequently, the easy price comparison that is the foundation of the open price argument has never been a real possibility." Pet. App. 71a-72a n.15; see also *id.* at 69a.

"pricing below cost for the purpose of driving rivals out of a market and recouping the losses through higher profits earned later in the absence of competition" (Pet. App. 74a). Finding that the ease of entry into the shipping industry and the existence of "plentiful" alternatives for shippers would make it impossible for a carrier engaging in predation to earn the high profits needed to offset earlier losses (*id.* at 75a), the Commission determined that contract carriers are not likely to engage in predatory pricing. It concluded that "the proper public policy approach is to allow regulatory reform to go forward, and adjust for potential, but improbable, risks only if they do in fact materialize" (*ibid.*).[2]

3. The court of appeals unanimously affirmed the Commission's order (Pet. App 1a-57a).[3] The court first held that the exemption provisions of the Interstate Commerce Act authorize the Commission to exempt all motor contract carriers of property from the tariff filing requirement. Noting that "the exemption provisions assign broad authority to the Commission," the court concluded that in construing the statute "the agency's interpretative domain is at its zenith and the judicial license at its nadir" (*id.* at 24a). The court rejected petitioners' arguments that the statutory exemption authority cannot be exercised on a class-wide basis (*id.* at 28a-39a).

The court of appeals also upheld the ICC's decision to grant the exemption in this case. It found that the Commission had correctly determined that the elimination of the tariff filing requirement would result in cost savings

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[2] Commissioner Andre and Vice Chairman Sterrett filed a concurring opinion agreeing with the Commission's conclusions (Pet. App. 78a-85a).

[3] The court concluded that challenges to the Commission's orders regarding exemptions of individual contract carriers were moot "by virtue of [the court's] decision * * * to affirm the Commission's broad exemption" (Pet. App. 13a).

and enable contract carriers to respond more easily to competition (Pet. App. 49a-52a). With respect to petitioners' claim that the exemption placed them at a competitive disadvantage, the court stated that such a "competitive disadvantage is not necessarily contrary to the purpose of the amended Motor Carrier Act" (*id.* at 41a), but that, in any event, the "fears of competitive disadvantage are greatly exaggerated" (*id.* at 42a). The court noted that the cost savings to contract carriers were not likely to give individual contract carriers a significant competitive advantage (*ibid.*). It also rejected the argument that the exemption from tariff filing would enable contract carriers to benefit from secret prices (*id.* at 43a-44a). Finally, the court agreed with the Commission's conclusion that contract carriers are not likely to engage in discriminatory or predatory pricing (*id.* at 45a, 48a-49a), and noted that "the Interstate Commerce Commission, the Federal Trade Commission, and aggrieved carriers all have the proven ability to expose the unlawful conduct and bring the lawbreaker to justice" (*id.* at 49a).

ARGUMENT

The well-reasoned opinion of the court of appeals, upon which we rely, does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. Petitioners object to the Commission's order on the grounds that the exemption poses a competitive threat to common carriers (see, *e.g.*, Pet. 6, 9), and will enable motor contract carriers to escape all ICC regulation and "engage in unfair and destructive pricing" (Pet. 4-5). These arguments rest upon "protectionist and anticompetitive" principles that are antithetical to modern-day motor carrier regulation (Pet. App. 31a) and, accordingly, were properly rejected by the Commission and the court below.

The court of appeals correctly observed that "[m]otor carrier regulation has evolved from a regime designed to protect common carriers against competition from contract carriers to one in which common and contract carriers are to compete with each other and with other modes of transportation as well" (Pet. App. 13a). The Motor Carrier Act of 1980 expressly states that it "is part of the continuing effort by Congress to reduce unnecessary regulation" (Pub. L. No. 96-296, § 2, 94 Stat. 793).[4] Congress announced that national policy with respect to the transportation of property by motor carriers is "to promote competitive and efficient transportation services" that "meet[] the needs of shippers, receivers, passengers, and consumers" (49 U.S.C. 10101(a)(2)). Congress sought in the 1980 statute to "remove[] many of the obstacles that have kept contract carriers from realizing their full potential." H.R. Rep. 96-1069, 96th Cong., 2d Sess. 22 (1980). In addition, it directed the ICC to "recognize the importance of competition and efficiency in motor carrier operations as the most desirable means for achieving national transportation goals and objectives" (*id.* at 12).

The Commission's decision in this case plainly comports with these congressional directives. The Commission found that the obligation to file tariffs containing contract rates imposes unnecessary regulatory costs, deters in-

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[4] Congress found (§ 3(a), 94 Stat. 793):

> the statutes governing Federal regulation of the motor carrier industry are outdated and must be revised to reflect the transportation needs and realities of the 1980's; that historically the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry; [and] that protective regulation has resulted in some operating inefficiencies and some anti-competitive pricing.

novation, and encourages price matching in the place of competition.[5] It granted the exemption in order to eliminate these undesirable effects and promote competition. The court of appeals upheld the Commission's conclusions. Pet. App. 44a, 51a-52a, 69a-70a, 71a.[6]

Petitioners argue (Pet. 6, 9, 11-12) that the Commission's decision will subject common carriers to a competitive disadvantage because only common carriers' rates will be revealed in tariff filings.[7] However, as both the Commission and the court of appeals observed, the tariffs filed by contract carriers have not recited every contract term and therefore have provided little assistance to common carriers competing with contract carriers (Pet. App. 44a & n.141, 71a-72a n.15). Moreover, common carriers can compete by providing contract carriage services (*id.* at 45a-46a).

At all events, as both the court and the Commission agreed, the Commission's obligation is to implement Congress's mandate for a regulatory system based to the greatest extent possible upon competition, not to provide

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[5] Since contract carriers' rates are set through negotiation, the rates are subject to invalidation by the Commission only if they are too low. *Contracts of Contract Carriers*, 1 M.C.C. 628, 629 (1937). As we discuss below (see pages 8-9), filing of tariffs is not needed to enable the Commission to enforce this requirement.

[6] Petitioners intimate (Pet. 12) that the Commission's decision is improper because Congress did not specifically indicate in the 1980 statute that tariff filings could be eliminated in order to promote competition if that decision is consistent with the public interest. However, as the court of appeals stated, "[t]here is nothing to indicate that Congress exhausted the deregulatory agenda it set in the 1980 Motor Carrier Act" (Pet. App. 30a).

[7] The court of appeals demonstrated (Pet. App. 42a-43a) that the cost saving to an individual contract carrier as a result of the exemption is unlikely to impose a competitive disadvantage on an individual common carrier.

the "equality of disadvantage" sought by petitioners (Pet. App. 46a-47a, 72a-73a). The Commission concluded that any loss of traffic by common carriers would occur in "marginal" areas and that "[s]ervice on-demand to the occasional shipper will remain a huge part of the market" (*id.* at 72a n.16). Since the Commission's task is to assess the public interest generally, not to safeguard common carriers' market shares, it correctly concluded that "it would be contrary to the public interest to forego the gains that will come of tariff elimination just to forestall the possibility of some conversion from common to contract carriage." *Ibid.*; see also *id.* at 41a-42a, 46a-47a.

Petitioners also contend (Pet. 8-9, 12-13) that the tariffs are necessary to prevent contract carriers from charging predatory rates, and that the ICC will be unable to regulate rates if tariff filings are not required. Both aspects of this contention are factually unsound. As the Commission and the court of appeals found, the competitive structure of the motor carrier industry itself precludes predation. Truckers can readily shift their operations to a different market if a competitor prices below cost, returning to the market if the alleged predator seeks to extract monopoly profits. Predation simply cannot be a profitable strategy in this market setting. Pet. App. 45a, 74a-75a; see also *Southern Motor Carriers Rate Conference* v. *United States,* No. 84-8499 (11th Cir. Oct. 18, 1985), slip op. 353; *American Trucking Association* v. *United States,* 755 F.2d 1292, 1299 (7th Cir. 1985). Thus, the Commission and the court of appeals correctly found the threat of below-cost pricing insufficient to justify the burden of requiring continued contract carrier tariff filing.

Moreover, as two commissioners noted, no increase in predation had been observed after previous tariff exemptions: "[t]he experience so far has been a welcome increase in the vitality of this market without any serious indication of anticompetitive behavior." Pet. App. 82a; see also *id.* at

43a. Thus, the Commission's determination "to allow regulatory reform to go forward, and adjust for potential, but improbable, risks only if they do in fact materialize" (*id.* at 75a), plainly is reasonable. *Id.* at 47a, 49a; see also *American Trucking Associations* v. *ICC*, 656 F.2d 1115, 1123 (5th Cir. 1981) (rail exemption can be revoked if exempt carriers engage in destructive competitive practices).[8]

2. Finally, contrary to petitioners' contention (Pet. 14-16), this Court's decision in *Interstate Commerce Commission* v. *American Trucking Associations*, No. 82-1643 (June 5, 1984), is wholly irrelevant to the issues presented here. The Court held in *American Trucking Associations* that the Commission's discretionary authority to supplement express statutory remedies empowers the Commission to reject retroactively tariffs submitted in violation of rate bureau agreements (slip op. 4-5, 10-16). The Court held that "the Commission may elaborate upon its express statutory remedies when necessary to achieve specific statutory goals" (*id.* at 10), and specifically concluded that "[t]o lie within the Commission's discretionary power, the proposed remedy must satisfy two criteria; first, the power

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[8] Petitioners argue (Pet. 12-13) that this analysis is incorrect because suspension of a rate before it becomes effective is the only appropriate remedy in a case of predation. However, the Commission has only 30 days to determine whether to suspend a tariff before the tariff goes into effect (see 49 U.S.C. 10762(c)(3)). Since predation claims are complex and cannot be adequately assessed in this short time, the Commission has announced that it will not suspend proposed rates when it receives an allegation of predation. It will investigate such allegations in formal complaint proceedings pursuant to 49 U.S.C. 11701 so that all of the relevant evidence can be developed. See *American Trucking Association* v. *United States*, 755 F.2d at 1295-1299. Thus, petitioners' argument for the maintenance of the tariff filing requirement is unavailing because the Commission would not suspend a proposed rate because of an allegation of predation.

must further a specific statutory mandate of the Commission, and, second, the exercise of power must be directly and closely tied to that mandate" (*id.* at 13).

American Trucking Associations has no application here because this case involves exemption authority expressly conferred upon the Commission by Congress. The Commission's decision thus rests upon express authority, not upon implied authority of the type at issue in *American Trucking Associations.*[9] Moreover, as we have demonstrated, the Commission's exemption of contract carriers from burdensome tariff filing requirements clearly furthers the Commission's statutory mandate in this area.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Associate General Counsel

CRAIG M. KEATS
Attorney
Interstate Commerce Commission

NOVEMBER 1985

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[9] Petitioners' reliance (Pet. 11-12) on *Central Forwarding, Inc.* v. *ICC*, 698 F.2d 1266 (5th Cir. 1983), is similarly misplaced because that case also involved a challenge to the Commission's exercise of implied authority.